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Nos. 82-977 & 82-898

IN THE

Supreme Court of the United States

October Term, 1982

MINNESOTA STATE BOARD
FOR COMMUNITY COLLEGES,
Appellant,

and

MINNESOTA COMMUNITY COLLEGE
FACULTY ASSOCIATION,
MINNESOTA EDUCATION ASSOCIATION,
and NATIONAL EDUCATION ASSOCIATION,
Appellants,

v.

LEON W. KNIGHT, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF MINNESOTA, FOURTH DIVISION

REPLY BRIEF OF APPELLANT LABOR ORGANIZATIONS

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Introduction	2
Argument	2
A. Appellees Have Suffered No Infringement Of Their First Amendment Rights	2
B. Compelling Governmental Interests Support PELRA's Meet And Confer System	8
C. Even If PELRA's Meet And Confer Procedure Is Unconstitutional, The Lower Court's Ordering Of Cumulative Voting Was Erroneous	10
D. Appellees' Brief In No. 82-977 Fails To Address The Issues As To Which This Court Has Noted Probable Jurisdiction	11
Conclusion	12

TABLE OF AUTHORITIES

Page

Cases:

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 8, 11

Cousins v. Wigoda, 419 U.S. 447 (1975) 5

Democratic Party v. Wisconsin, 450 U.S. 107 (1981) 5

General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) 11

Knight v. Minnesota Community College Faculty Ass'n, No. 82-901 11

Perry Education Ass'n v. Perry Local Educators' Ass'n, —— U.S. ——, 74 L.Ed.2d 794 (1983) 3, 4, 11

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) 3

Minnesota Statutes:

Minn. Stat. §179.61 (1982) 8

Minn. Stat. §179.66, subd. 7 8

Minn. Stat. §179.73 (1982) 8

Other Authorities:

American Constitutional Law, 791 (1978) 6

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INTRODUCTION

Appellants Minnesota Community College Faculty Association ("MCCFA"), Minnesota Education Association ("MEA") and National Educational Association ("NEA") (collectively referred to as the "appellant labor organizations"), file this brief in reply to the briefs of the appellees in Nos. 82-898 and 82-977.

ARGUMENT

A. Appellees Have Suffered No Infringement Of Their First Amendment Rights

Appellees make three concessions of fundamental importance. First, appellees concede that neither the First nor the Fourteenth Amendments grant to community college instructors the right to meet and confer with appellant Minnesota State Board for Community Colleges ("State Board"). The meet and confer right arises solely from statute. Brief of Appellees, No. 82-898, 3-5. Second, appellees concede that the meet and confer function may occur on a representational basis. Brief of Appellees, No. 82-898, 20-21. Third, appellees concede that they can and do express their views to community college administrators outside the meet and confer process. Brief of Appellees, No. 82-898, 11. Appellees nevertheless claim that their exclusion from participation as members of the MCCFA's meet and confer committees is an unconstitutional discrimination which is "repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment."

While the appellees, unlike the lower court, purport to invoke the Equal Protection Clause of the Fourteenth Amendment in support of the lower court's judgment, their argument

adds little to the analysis of this case. This Court noted in *Police Department of Chicago v. Mosley*, 408 U.S. 92, 94-95 (1972), that a classification which is challenged on the basis that it discriminates according to the content of protected speech activity involves a situation where "the equal protection claim is closely intertwined with First Amendment interests." Where a governmental action discriminates on the basis of protected First Amendment interests, the action will be "carefully scrutinized" and must be supported by "a substantial governmental interest." *Id.* at 99. This analysis does not avoid the central question before the Court: whether PELRA's "meet and confer" provisions, as applied by the MCCFA and the State Board, infringe upon First Amendment interests. If the "meet and confer" system does not impinge appellees' First Amendment interests, then it does not burden a fundamental right and "need not be tested by the strict scrutiny applied when government action impinges upon a fundamental right protected by the constitution." *Perry Education Ass'n v. Perry Local Educator's Ass'n*, —— U.S. ——, 74 L.Ed.2d 794, 810 (1983).

In the initial brief, appellant labor organizations set forth several reasons why PELRA's meet and confer provisions, as applied, do not infringe upon appellees' First Amendment rights. None of these reasons have been persuasively refuted by appellees.

First, appellees have no First Amendment right to compel the State Board to listen and respond to them. This the appellees concede. It follows from this proposition that the government may decide, unencumbered by constitutional restraint, with whom it will confer concerning policy decisions. Were this not the case, the decision of a governmental official to

confer with one person or group would necessarily create a right to confer with that governmental official in any other person or group which asserted a right to equal treatment. Effectively, the result would be the creation of a right which appellees' concede they do not have: the absolute right to compel the government to listen and respond. The only other theoretical possibility would be the plainly implausible suggestion that the government official consult with no one. Where the government creates a forum, public or non-public, certain constitutional constraints may apply in limiting access to that forum. Where the activity in question, however, is private consultation by governmental officials, no forum exists and the First Amendment does not dictate with whom the government must consult. Because meet and confer is such consultation, appellees raise no First Amendment interest when they complain of exclusion from meet and confer committees.

Second, even if meet and confer is treated as a non-public forum, the limitations of access which exclude appellees from being on the MCCFA's meet and confer committees are reasonable and do not amount to an effort to suppress appellees' expression because the state opposes their views. Meet and confer thus passes muster under *Perry Education Ass'n v. Perry Local Educators' Ass'n, supra*. Appellees, for their part, ignore *Perry Education Ass'n*.[1] In doing so, appellees ignore decisive precedent that a public employer's decision to limit

[1] In their brief in No. 82-977, the appellees assert that *Perry Education Ass'n* does not preclude their argument that the entire concept of exclusive representation is unconstitutional. Brief of Appellees, No. 82-977, 14, 23-24. In the brief which addresses the issues raised by this appeal—that in No. 82-898—the appellees fail to even cite *Perry Education Ass'n*.

access to a non-public forum to the exclusive representative of that employer's employees is reasonable and content-neutral.

Third, any distinction which is made in the selection of the meet and confer representative is based only on who was and who was not selected by the majority of community college faculty members to be their meet and confer representative. PELRA provides that there is only one meet and confer representative. Where a meet and negotiate representative has been selected by the employees, that representative is also the meet and confer representative. *See*, Brief of Appellant Labor Organizations, 6-7, 31-35. Having been selected in a democratic manner encompassing all faculty members to function as the meet and confer representative, the MCCFA chooses persons to speak for it in meet and confer sessions. This selection process is no different than the selection of persons to perform any number of functions on behalf of the organization—from election of officers to selection of a negotiations team. No one would argue that a non-member of an organization has any right to participate in choosing that organization's officers. Indeed, this Court has held that the First Amendment freedom of association of the members of an association is violated where the state acts to force the involvement of outsiders in the internal functions of that association. Thus, in *Cousins v. Wigoda*, 419 U.S. 447 (1975), the Court ruled that a state could not constitutionally override the procedures established by the Democratic National Party for selection of delegates to the party's national convention. Similarly, the Court ruled in *Democratic Party v. Wisconsin*, 450 U.S. 107 (1981), that the First Amendment right of association precluded a state from indirectly interfering with the process by which delegates are chosen to the Democratic National Convention. In that case,

the state law requiring that delegates to the convention be bound by the results of Wisconsin's "open" presidential primary election was found to be an unconstitutional interference with the National Party's rules limiting the right to participate in delegate selection to persons declaring preference to the Democratic Party. The MCCFA and its members also have the First Amendment right to limit participation on the committee which will represent the MCCFA in the meet and confer process to those persons who are members of the association, and can be expected to express the views of the organization and which are also the views of the majority of community college instructors who selected that organization.

> Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.

L. Tribe, *American Constitutional Law*, 791 (1978).

The lower court and the appellees purport to meet this contention by asserting that in the system of academic governance used in some community colleges prior to PELRA, faculty members "had the right to vote for individual representatives that would deal with the issues of college and faculty governance." Brief of Appellees, No. 82-898, 14. They further argue that the democratic selection of the MCCFA "deprived Knight and other non-members of that organization of the opportunity they enjoyed prior to PELRA to participate equally with all faculty members in faculty governance . . ." *Id.* This statement, of course, is false. The appellees were *part* of the process which designated the MCCFA as the meet and confer representative.

PELRA does not, as argued by appellees, grant individual professional employees the right to meet and confer "and then discriminatorily withdraw that right simply because they choose to remain nonmembers of the exclusive representative, MCCFA." Brief of Appellees, No. 82-898 at 5. PELRA grants to professional employees only a right to participate in designating a meet and confer representative. The same provision which establishes the meet and confer right requires that meet and confer occur through a single representative. Minn. Stat. §179.73 (1982). PELRA reduced the number of governance representatives with which the state desired to confer to one. It ultimately is this reduced number which is at the heart of appellees' complaint. And yet, appellees and the lower court have conceded that meet and confer may occur through a representational system. At no time have the appellees quoted authority or even argued that the First Amendment or any other provision of the Constitution dictate the number of representatives which must be established in such a system. Given that PELRA has permissibly established that meet and confer occur between the employer and a single representative, and given that the selection of that representative has occurred on a democratic basis, appellees claim can be seen for what it is: Unhappiness over their failure to be elected by their colleagues. Further, the relief which they desire is revealed as equally unpalatable: A desire to force themselves and their views upon an unwilling majority of faculty members.

B. Compelling Governmental Interests Support PELRA's Meet And Confer System

In the initial brief, appellant labor organizations argued that the substantial governmental interest in promoting labor peace supports PELRA's meet and confer structure. The goal of labor peace has been found to justify collective bargaining by an exclusive representative in both public and private sectors. *See Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The policies found compelling in the context of negotiating terms and conditions of employment are just as persuasive in the meet and confer context.

In response, the appellees dwell upon the provision of PELRA which establishes the meet and confer procedure in order "to encourage close cooperation between public employers and professional employees by providing for discussions and the mutual exchange of ideas." Minn. Stat. §179.73 (1982). This provision, viewed in isolation, might arguably support the establishment of meet and confer procedures which do not involve the exclusive representative. However, the meet and confer procedure must be viewed in the context of the overriding goals of the statute: Attaining labor peace through an orderly process which establishes "special rights, responsibilities, procedures and limitations regarding public employment relationships . . ." Minn. Stat. §179.61 (1982). This orderly process in the case of meet and confer is achieved through Minn. Stat. §179.66, subd. 7:

> The employer shall not meet and negotiate or meet and confer with any employee or group of employees who are at the time designated as a member or part of an appropriate employee unit except through the exclusive representative if one is certified for that unit or as provided

> for in section 179.69, subdivision 1, provided that this subdivision shall not be deemed to prevent the communication to the employer, other than through the exclusive representative, of advice or recommendations by professional employees, when such communication is a part of the employee's work assignment.

The reasons why this overriding policy supports the meet and confer structure established by PELRA have previously been discussed at length. Summarized, any meet and confer procedure which operates other than through the exclusive representative would undermine the meet and negotiate process, would decrease the effectiveness of faculty input in meet and confer, would result in confusion in the presentation of employee views, and would subject the employer to conflicting demands. Appellees fail to address these contentions.

Appellees argue that knowledge and expertise is not "a peculiar attribute of members of MCCFA." What *is* a peculiar attribute of the MCCFA, however, is its status as the spokesperson for a majority of faculty members. As they have acknowledged, appellees have the right to communicate their ideas and express their views to college administrators on an informal basis. The state has a compelling interest, however, in recognizing an exclusive spokesperson for the faculty, and meeting and conferring with that exclusive representative concerning the overall faculty viewpoint on proposed policy decisions.

C. Even If PELRA's Meet And Confer Procedure Is Unconstitutional, The Lower Court's Ordering Of Cumulative Voting Was Erroneous

Appellees do not argue that the First Amendment directly requires that cumulative voting be used in conducting meet and confer elections. Rather, argue appellees, cumulative voting was a permissible remedy to overcome the "discrimination" of the meet and confer procedure.

Appellees incorrectly perceive this case as one involving lingering effects of whatever constitutional violation may have occurred. This is not a case comparable to, for example, a history of employment discrimination in hiring where a remedy of quotas in hiring is imposed to rectify past discrimination in hiring without ordering the immediate termination of white male employees who unknowingly benefited from the employer's discriminatory conduct. Upon the lower court's order in this case, the entire meet and confer committee was elected in a general election among faculty members. Whatever constitutional violation which existed was extinguished with the replacement of the MCCFA-appointed meet and confer committee with the elected meet and confer committee.[2] If appellees, as they conceded, have no First Amendment right to a system of cumulative voting, then cumulative voting may not be imposed as a remedy. This court has recognized "fundamental limitations on the remedial powers of the federal courts" which include the following proposition: "Those powers could be exercised only on the basis of a violation of

[2] Appellees are again compelled to admit to the reality that the MCCFA enjoys substantial majority-support among the faculty and, therefore, they are unwilling to permit an open democratic selection process serve to determine their representative.

the law and could extend no further than required by the nature and extent of that violation." *General Bldg. Contractors Ass'n. v. Pennsylvania*, 458 U.S. 375 (1982). In this case, the lower court overstepped those fundamental limitations by imposing cumulative voting in its supplemental order.

D. Appellees' Brief In No. 82-977 Fails To Address The Issues As To Which This Court Has Noted Probable Jurisdiction

In their brief in No. 82-977, appellees argue that any system of exclusive representation is constitutionally invalid because it unlawfully delegates governmental sovereignty. This is the same thesis forwarded in the appellees' appeal to this Court in *Knight v. Minnesota Community College Faculty Ass'n.* No. 82-901, as to which the Court summarily affirmed. Appellees' arguments in this regard must be rejected as inconsistent with the Court's affirmation of exclusive representation in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and *Perry Education Ass'n v. Perry Local Educators' Ass'n*, —— U.S. ——, 74 L.Ed.2d 794 (1983). For a further discussion of the appellees' contentions, the Court is respectfully referred to the Motion to Affirm of Appellant Labor Organizations in No. 82-901.

Appellees' arguments concerning exclusivity also fail because of the non-binding nature of the meet and confer process. The MCCFA does not enter into a written contract through the meet and confer process which is then binding on the employer and all bargaining unit members. The employer has the obligation to listen and respond in meet and confer, but it retains the total decision-making authority on issues discussed. Thus, whatever the appellees may find objectionable about exclusive

representation in the context of the negotiation of a collective bargaining agreement has no application to the meet and confer process.

CONCLUSION

Based on the foregoing, the appellant labor organizations reiterate the request for relief contained in their Brief on the Merits.

Respectfully submitted,

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